A

EDMUND MING KWAN

v.

EXTRA EXCEL (MALAYSIA) SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING PETITION NO: D1-26-56-2004]
14 MARCH 2007

C ***CIVIL PROCEDURE:*** *Affidavits - Cross-examination, application for - Application to cross examine respondents on affidavits - Whether leave to cross-examine allowed on 'contempt affidavits' - Whether prejudicial to respondents - Whether cross-examination would be for a collateral purpose - Rules of the High Court 1980, O. 38 r. 2(3)*

D ***EVIDENCE:*** *Affidavit - Cross-examination, application for - Application to cross-examine respondents on affidavits - Whether leave to cross-examine allowed on 'contempt affidavits' - Whether prejudicial to respondents - Whether cross-examination would be for a collateral purpose - Rules of the High Court 1980, O. 38 r. 2(3)*

E

This was an application under encl. 186 by the applicant/petitioner under O. 38 r. 2(3) of the Rules of the High Court 1980('RHC') or under the inherent powers of the court for leave to cross examine the affiants (the respondents in the s. 181 petition) on
F the affidavits affirmed by the second respondent to enable this court to decide whether the second and fourth respondents have committed criminal contempt of court. The principal purpose of the petition, which was encompassed in encl. 1 and 10, have taken some inordinate time to resolve with finality. There were a
G myriad of applications that have been filed by both sides in relation to the petition. Subsequently, the petitioner applied under encls. 162 and 170 for leave to make an application for an order of committal for criminal contempt of court against the second respondent upon the grounds that he had 'wilfully and intentionally
H made false and misleading statements' in his affidavit affirmed on 3 October 2004 (encl. 14) read together with his affidavits affirmed on 19 August 2005 (encl. 127) and on 18 November 2005 (encl. 147), and against the fourth respondent for affirming an affidavit on 16 November 2004 (encl. 28) wherein he adopted the contents
I of the second respondent's affidavit (encl. 14) and for having authorized the second respondent to affirm encls. 127 and 147. Leave to make the said application was granted. Soon thereafter

the petitioner made an application (encl. 186) before this court for leave to cross-examine the second and fourth respondents ('the said respondents) on all the related affidavits. The petitioner's allegation that the said respondents have made false and misleading statements in encl. 182A and in the six other previous affidavits was an allegation of criminal contempt. The issues were (a) on the depositions of which particular affidavit or affidavits does the applicant seek the court's leave to have the said respondents cross-examined for the specific purpose of affixing or to nail them for criminal contempt ('contempt affidavits') and (b) what guidelines should this court adopt to determine whether to allow such leave.

Held (dismissing petitioner's application in encl. 186):

(1) A criminal and civil contempt of court is an offence of a criminal character or in nature of a criminal charge, and as such it must be proved beyond reasonable doubt. To prove an offence of criminal contempt the petitioner would have to establish or clinch three essential ingredients namely: (i) the statement deposed to is in fact false and misleading *(actus reus)*; (ii) the statement was intended to be false and misleading *(mens rea)* and (iii) the statement was made with the actual or inevitable intention or consequence of frustrating or obstructing the administration of justice or interferes with or impedes the administration of justice. On the question whether leave to cross examine could be allowed on 'contempt affidavits' due to the grave penal consequences which may result from the court's finding against the said respondents, this court would adopt the views of Lord Denning MR in *Comet Products UK Ltd v. Hawkex Plastics Ltd And Another*. Consequently, the second and fourth respondents were not compellable witnesses in these contempt proceedings. (paras 10, 11 & 12)

(2) To allow the petitioner to cross examine the respondents on encl. 182A or any of the previous affidavits would operate unfairly and would be prejudicial against the alleged contemnor as it would be difficult to restrict such cross-examination to only the circumstances of the committal hearing so as to ensure that such exercise would not be for a collateral purpose. Unrestricted cross-examination would have little relevance to the petitioner's allegations of contempt and would

A be severely prejudicial to the said respondents since it would lead to an examination of the whole circumstances of the petition itself. (para 12)

(3) The petitioner's application for cross-examination does not
B sufficiently define or limit the scope of the cross examination. From the written submission of counsel for the petitioner it also appeared probable that the petitioner would take advantage of this proposed cross examination to fish for evidence to support his principal non-contempt applications
C such as encls. 1 and 10. This made it very likely that the proposed cross examination would lead to an investigation of the whole of the circumstances of the re-amended petition, and if this happened the cross-examination would be for a collateral purpose. (para 14)

D **(4)** This court should exercise extreme caution in the conduct of these committal proceedings lest the respondents' rights to a fair hearing are impeded. And hence, the petitioner must show a greater necessity and stronger grounds for cross-examining
E the respondents in these committal proceedings than is normally required to cross-examine deponents in ordinary applications. This was simply because the consequences in these committal proceedings for the respondents were very serious. The allegation of perjury is an allegation of criminal
F contempt. The respondents were facing the possibility of imprisonment. (para 16)

(5) The cross-examination would result in the extended hearing of the committal application. The hearing would be further protracted as the respondents' counsel would take repeated
G objections to irrelevant or inappropriate cross examination. Thus, most important, if leave was allowed it would lead to an inordinate delay of the trial of encl. 1. Further, cross-examination was not essential as the facts and circumstances in these allegations of contempt add little weight to the issues
H that have to be decided at the committal hearing. (para 18)

(6) The respondents when faced with the petitioner's application for committal had to file the contempt affidavit (encl. 182A) in opposition. The petitioner alleged contempt on the basis
I that the six previous affidavits contained false and misleading statements. The respondents filed the contempt affidavit (encl. 182A) in reply, as omitting to do so would have

amounted to an admission of the petitioner's allegations. Further, by cross examining the respondents on the contempt affidavit, the petitioner would require this court to decide on issues raised in the six previous affidavits prior to the hearing of the respective applications in respect of which they were filed. This predetermination of the issues would be prejudicial to the respondents, and was akin to placing the cart before the horse. Consequently, this court further held that to allow cross examination would operate unfairly and would be prejudicial to the said respondents. (paras 18 & 19)

[A date has been fixed for hearing of the contempt application (encl. 178)]

Case(s) referred to:

Comet Products UK Ltd v. Hawkex Plastics Ltd & Another [1971] 2 QB 67 ***(refd)***

Dr Leela Ratos & Ors v. Anthony Ratos [1996] 4 CLJ 33 HC ***(refd)***

E & E Equipment Sdn Bhd v. Speci Avenue (M) Sdn Bhd & Ors [2005] 1 LNS 355 HC ***(refd)***

Indrani Rajaratnam & Ors v. Fairview Schools Bhd [2002] 1 CLJ 1 CA ***(refd)***

Jaginder Singh & Ors v. The Attorney-General [1983] 1 CLJ 69; [1983] CLJ (Rep) 176 FC ***(refd)***

R v. Christopher Charles Murfett [2004] VSC 160 ***(refd)***

Re Bramblevale Ltd [1997] 3 CLJ 197 ***(refd)***

Rice v. Gordon [1843] 60 ER 225 ***(refd)***

Tay Seng Keng v. Tay EK Seng Co Sdn Bhd [1977] 1 LNS 133 HC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 SC ***(dist)***

Yee Sang Metal [2002] HKCU 1255 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 38 r. 2(3)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 9(1), pp 242-243

For the petitioner - Logan B Sabapathy (PY Liew & LH Wong with him); M/s Logan Sabapathy & Co

For the respondents - Mah Weng Kwai (NS Guok & Raymond Mah with him); M/s Mah Weng Kwai & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Vincent Ng J:

[1] Now before me is an application by the petitioner under encl. 186 for leave to cross-examine the 2nd and 4th respondents at the hearing of the notice of motion (encl. 178) for contempt. Because the principal purpose of the above petition, which is encompassed in encls. 1 and 10, seem to have taken some inordinate time to resolve with finality, perhaps it is appropriate here to set out the myriad applications (a record number in my court or other courts, for that matter) that have been filed by both sides in relation to the petition. The various applications with their enclosure numbers and nature of application are here set out and tabulated as follows:

Item	Encl No.	Date	Filed by	Nature of Application
1)	1	1/7/04	Petitioner	Application under s. 181 Companies Act 1965
2)	2	21/7/04	Petitioner	Application under O. 20 r. 5 RHC 1980 to amend Petition
3)	5	12/8/04	Petitioner	Summons For Direction under O. 88 r. 7 RHC 1980
4)	10	25/9/04	Petitioner	Summons In Chambers (Application to appoint Receivers and Managers)
5)	12	5/10/04	1st & 2nd Respondents	Application under O. 23 RHC 1980 (Security for Costs)
6)	16	5/10/04	3rd Respondent	Application under O. 23 RHC 1980 (Security for Costs)
7)	18	5/10/04	5th Respondent	"
8)	20	8/10/04	4th Respondent	"

Item	Encl No.	Date	Filed by	Nature of Application
9)	34	30/12/04	1st & 2nd Respondents	Application under O. 92 r. 4 RHC 1980 (1st & 2nd Respondent) be allowed to file and served their affidavit in reply to the Petitioner for an appointment of Receivers and Managers after the Petitioner has furnished the amount of Security for the Respondents' Costs
10)	38	17/1/05	5th Respondent	Application under O. 92 r. 4 RHC 1980 (as per item 9)
11)	40	17/1/05	3rd Respondent	Application under O. 92 r. 4 RHC 1980 (as per item 9)
12)	42	19/1/05	4th Respondent	Application under O. 92 r. 4 RHC 1980 (as per item 9)
13)	55	28/1/05	Petitioner	Application under O. 20 r. 5 RHC 1980 (for amendment of Petition)
14)	65	23/3/05	Petitioner	Notice of Appeal to the Judge in Chambers (against SAR's decision dated 18/3/05 allowing Security for Costs for 4th Respondent in the sum of RM250,000.00)
15)	66	23/3/05	Petitioner	Notice of Appeal to the Judge in Chambers (against SAR's decision dated 18/3/05 allowing Security for Costs for 1st & 2nd Respondents in the sum of RM400,000.00)

Item	Encl No.	Date	Filed by	Nature of Application
16)	67	23/3/05	Petitioner	Notice of Appeal to the Judge in Chambers (against SAR's decision dated 18/3/05 allowing Security for Costs for 3rd Respondent in the sum of RM250,000.00)
17)	74	25/3/05	Petitioner	Application under O. 92 r. 4 RHC 1980 (for an extension of time to deposit monies for 4th Respondent's Security for Costs)
18)	76	25/3/05	Petitioner	Application under O. 92 r. 4 RHC (for an extension of time to deposit monies for 3rd Respondent's Security for Costs)
19)	78	25/3/05	Petitioner	Application under O. 92 r. 4 RHC 1980 (for an extension of time to deposit monies for 1st & 2nd Respondents' Security for Costs)
20)	81	23/3/05	5th Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all proceedings pending the disposal of the 5th Respondent's application for Security for Costs and the appeals, if any, before Judge in Chambers)
21)	83	24/3/05	3rd Respondent	Notice of Appeal to the Judge in Chambers (against SAR's decision on 18/3/05 on Security for Costs)

Item	Encl No.	Date	Filed by	Nature of Application
22)	84	25/3/05	4th Respondent	Notice of Appeal to the Judge in Chambers (against SAR's decision on 18/3/05 for Security on Costs)
23)	86	28/3/05	3rd Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all proceedings pending the disposal of 3rd Respondent's application for Security for Costs and the appeals, if any, before the Judge in Chambers)
24)	88	14/4/05	1st & 2nd Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all proceedings pending the disposal of 1st and 2nd Respondents' application for Security for Costs and the appeals, if any, before the Judge in Chambers
25)	93	19/4/05	Petitioner	Notice of Appeal to the Judge in Chambers (against SAR's decision dated 15/4/05 allowing Security for Costs for 5th Respondent in the sum of RM50,000.00)
26)	94	19/4/05	5th Respondent	Notice of Appeals to the Judge in Chambers (against SAR's decision dated 15/4/05 for Security on Costs)

Item	Encl No.	Date	Filed by	Nature of Application
27)	95	19/4/05	Petitioner	Application under O. 92 r. 4 RHC 1980 (of an extension of time to deposit monies for 5th Respondent's Security for Costs)
28)	98	5/5/05	4th Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all proceedings pending the disposal of 4th Respondent's application for Security for Costs and the appeals, if any, before the Judge in Chambers)
29)	114	10/8/05	4th Respondent	Application under O. 92 r. 4 RHC 1980 (to stay the Petition and all the proceedings pending the 4th Respondent's appeal to the Court of Appeal)
30)	116	10/8/06	1st & 2nd Respondent	Application under O. 92 r. 4 RHC (to stay the Petition and all the proceedings pending the 5th Respondent's appeal to the Court of Appeal)
31)	120	10/8/05	5th Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all the proceedings pending the 5th Respondent's appeal to the Court of Appeal)

Item	Encl No.	Date	Filed by	Nature of Application
32)	121	10/8/05	3rd Respondent	Application under s. 25(2) CJA 1964 and O. 92 r. 4 RHC 1980 (to stay the Petition and all the proceedings pending the 3rd Respondent's appeal to the Court of Appeal)
33)	126	23/8/05	All the Respondents	Application for an Order that the Proposed Receivers and Managers do provide Security for Damages under O. 30 r. 2 RHC 1980
34)	131	7/10/05	Petitioner	Application under O. 29 r. 1 RHC 1980 for injunction to restrain 1st Respondent from implementing the shareholders resolution dtd 30.9.05
35)	145	25/11/05	Petitioner	Similar application to restrain 1st Respondent from implementing the shareholders' resolution dtd 30.9.05 read with their resolution dtd 21.11.05
36)	162	29/12/05	Petitioner	Ex-parte Notice of Motion (under O. 52 r. 2 RHC 1980 for leave to make an application for an Order of Committal)
37)	164	3/1/06	Petitioner	Application under O. 24 r. 3 RHC 1980 for discovery and inspection of documents described in Annexures A, B, C and D

Item	Encl No.	Date	Filed by	Nature of Application
38)	171	24/1/06	Petitioner	Similar application for discovery and inspection of documents described in Annexures A1, B1, C1 and D1
39)	170	24/1/06	Petitioner	Ex-parte Notice of Motion (under O. 52 r. 2 RHC 1980 for leave to make an application for an Order of Committal)
40)	178	22/3/06	Petitioner	Notice of Motion (for Order of Committal under O. 52 r. 3 RHC 1980)
41)	186	16/6/06	Petitioner	Summons In Chambers – Application under O. 38 r. 2(3) RHC 1980 (for cross-examination of 2nd and 4th Respondents at the hearing of the Notice of Motion for contempt)

[2] In encls. 12, 16, 18 and 20, the 1st to 5th respondents applied for Security for Costs in the aggregate sum of RM2,900,000 in respect of all the respondents, on the grounds that the petitioner resides in the United States and has no assets in Malaysia save for the shares that he holds in the 1st respondent company. The further grounds being that the 3rd respondent resides in Singapore whilst the 4th respondent resides in Taiwan and has to travel therefrom to attend the hearing of the various proceedings here in Kuala Lumpur. Enclosures 12, 16, 18 and 20 was first heard before the senior assistant registrar (SAR) of the High Court, who on 18 March 2005 and on 15 April 2005 allowed an aggregate sum of RM950,000 as Security for Costs. An appeal was then lodged by both sides to the judge in chambers, and on 22 June 2005 after hearing arguments on both sides, I reduced the aggregate quantum of the security for costs in respect of all the respondents from RM950,000 to RM390,000 to be

deposited into the joint solicitors' accounts of both parties; with my brief grounds marked encl. 106 (as set out in my judge's notes) read out to the parties when I delivered my decision. Being unhappy with my decision the respondents lodged notices of appeal dated 18 July 2005 (by 4th respondent), 19 July 2005 (by 1st and 2nd respondents), 20 July 2005 (by 3rd respondent) and 20 July 2005 (by 5th respondent) to the Court of Appeal. Pending the outcome of this appeal, the respondents applied (under encls. 114, 116, 120 and 121) for a stay of the hearing of encls. 1 and 10. On 31 October 2005 I refused the stay as I was concerned that the principal purpose of the petitioner's petition in encls. 1 and 10 should be disposed of with reasonable promptitude.

[3] Then, to the surprise of this court and delight of the respondents, something remarkable happened. The petitioner applied under encls. 162 and 170 for leave to make an application for an Order of Committal for criminal contempt of court – against the 2nd respondent upon the grounds that the second respondent had "wilfully and intentionally made false and misleading statements in his affidavit affirmed on 3 October 2004 (encl. 14) read together with his affidavits affirmed on 19 August 2005 (encl. 127) and on 18 November 2005 (encl. 147)", and against the 4th respondent for affirming an affidavit on 16 November 2004 (encl. 28) wherein he adopted the contents of the 2nd respondent's affidavit (encl. 14) and for having authorised the 2nd respondent to affirm encls. 127 and 147. For ease of reference the 2nd and 4th respondents shall be referred to as the 'said respondents'. Leave to make the said application was granted by me on 15 March 2006. Soon thereafter the petitioner made an application (encl. 186), now before me, for leave to cross-examine the said respondents on all the related affidavits. The respondents then contended that despite the fact that this court had refused the stay of hearing on encls. 1 and 10 when they had appealed to the Court of Appeal against my decision which allowed a reduction of the aggregate quantum of security for costs to RM390,000, now in the face of the petitioner's current ongoing proceedings to have the said respondents committed for contempt of court, all other proceedings in the petition ought to be stayed pending the decision of this court on criminal contempt.

[4] Counsel for the said respondents cited the Supreme Court case of *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 *(Wee Choo Keong)*. With this remarkable change of circumstances I found myself in agreement with this contention of the respondents' counsel Mr Mah Weng Kwai, and my reasons are here set out.

(a) I am mindful of the distinction that, unlike the instant case, in *Wee Choo Keong* it was the alleged contemnor who was obliged by the court to first purge his alleged contempt, if any, before he could proceed with his application to set aside the injunction which resulted in the contempt proceedings. Yet simple logic dictates that, where it is trite law that a charge of contempt such as in the applications under encls. 162 and 170 for criminal contempt ('contempt applications') would have to be determined upon the higher beyond-reasonable-doubt test applicable to criminal cases (be it for criminal or civil contempt) whereas civil non-contempt applications ('non-contempt applications') such as the petitioner's other applications, which includes encls. 1 and 10 ('the petitioner's other applications') would be governed by the lower civil balance-of-probability test, this court should proceed first to deal with the more serious charge of contempt as it would entail considerations of the said respondents credibility on their affidavits in respect of the petition and other non-contempt applications.

(b) Should I decide otherwise, it would open floodgates which would enable a litigant who makes any application in civil proceedings to seek to have the opponent charged for contempt of court due to certain allegedly false depositions in the affidavit(s) in opposition, as soon as the party resists the litigant's application, and yet insists that his initial application be first heard. For this reason the ploy of instituting criminal applications which pertains to civil applications while the civil applications are pending disposal should be frowned upon by the court.

(c) It was the petitioner who had thought it fit or to adopt this strategy of instituting contempt proceedings against the said respondents even before any of the petitioner's applications could be heard. I have also to take note of the fact that the petitioner's counsel has not been able to locate any case

authorities to counter my above rationale for accepting Mr Mah's contention.

(d) If this court is to first proceed to dispose of any of the petitioner's civil applications (say encl. 10 or encl. 1) where the lower civil standard of proof has to be applied, and should it decide in favour of the said respondents, the court would have also virtually predetermined in favour of the said respondents on the criminal applications – that must be proved with the same degree of satisfaction as in a criminal charge – even before hearing the same.

[5] Now before me is the application (encl. 186) by the applicant/petitioner under O. 38 r. 2(3) of the Rules of the High Court 1980 (RHC) and or under the inherent powers of the court for leave to cross-examine the affiants (said respondents in the above s. 181 petition) on the affidavits affirmed by the 2nd respondent on 4 May 2006 to enable this court to decide whether they have committed criminal contempt of court. A criminal contempt is one which takes place in the face of the court, or which prejudices a fair trial. It includes acts which obstruct or tend to obstruct or interfere with the administration of justice. A civil contempt, otherwise known as contempt in procedure, takes place upon disobedience of an order made by the court in a civil action. Even a civil contempt which partakes of the nature of a criminal charge, is governed by the same standard of proof as in an ordinary criminal case as the contemnor may be sent to prison. The petitioner's allegation that the said respondents have made false and misleading statements in encl. 182A and in the six other previous affidavits is an allegation of criminal contempt.

[6] It was only when encl. 186 first came up for hearing that counsel for the petitioner then identified in full, the following seven affidavits (inclusive of encl. 182A) on which cross-examination of the said respondents were sought, namely:

(a) Hendrik's affidavit affirmed on 3 October 2004 (encl. 14);

(b) Le's affidavit affirmed on 16 November 2004 (encl. 28) – 4th respondent;

(c) Hendrik's affidavit Verifying List of Documents affirmed on 28 December 2004 (encl. 31);

(d) Hendrik's affidavit affirmed on 19 August 2005 (encl. 127);

(e) Hendrik's affidavit affirmed on 18 November 2005 (encl. 147);

(f) Hendrik's affidavit affirmed on 21 December 2005 (encl. 156); (all six affidavits referred to by respondent as 'Previous Affidavits') and

(g) Hendrik's affidavit affirmed on 4 May 2006 (encl. 182A) affirmed by 2nd respondent "in response to the committal proceedings initiated against him" to oppose encl. 178, (subsequently identified by the petitioner as 'the Contempt Affidavit').

[7] Enclosure 186 is a simple application, in respect of which extensive written submissions have been tendered to this court by both counsel, wherein intricate though convoluted arguments were advanced by counsel of the applicant/petitioner. However, this court should not fail to see the wood for the trees and not grasp the real issue for determination. The real focus ought to be, in my view: (a) on the depositions of which particular affidavit or affidavits does the applicant seek the court's leave to have the said respondents cross-examined for the specific purpose of affixing to or to nail them for criminal contempt for want of a better term to use in my analysis I would call this specie of affidavits 'contempt affidavits'; the other specie being 'non-contempt affidavits'; and, (b) what guidelines should this court adopt to determine whether to allow such leave. As the applicant has not identified with unequivocal clarity which is (are) the 'contempt affidavit(s)' concerned, I had to request for clarification for the purpose of identifying the contempt affidavits among the seven affidavits. On 10 January 2007 and 6 February 2007 the applicant's counsel identified the contempt affidavit, in respect of which citation for contempt was founded, as encl. 182A, which was affirmed by the 2nd respondent on behalf of himself and on behalf of the 4th respondent. And that, the latter was sought to be made liable because he had authorised the 2nd respondent to affirm encl. 182A on his behalf (though notably, the 3rd and 5th respondents had also authorised the 2nd respondent to affirm encl. 182A). This attempt at clarification had merely increased brain activity without enhancement of intellectual illumination.

[8] The reason is this. Though the 'contempt affidavit' was subsequently identified by the applicant as encl. 182A, yet this court should not fail to see that the real and sole purpose of the leave sought to cross-examine on all of the six aforelisted previous affidavits *vis-à-vis* encl. 182A is to enable the court to find the 2nd and 4th respondents in contempt and thus liable to penal sanctions. This must essentially and incontrovertibly be so. The pertinent question to ask is: to what purpose is cross-examination required on the other six previous affidavits besides encl. 182A? Is it to demonstrate that contempt has been committed in affidavit 182A? Then, the concomitant question is: whether the alleged lies or falsities had occurred in any of the six previous affidavits but not in encl. 182A, and conversely, whether the "false and misleading statements" had occurred in encl. 182A but not in any of the six previous affidavits. Furthermore, if the focus is on encl. 182A, I am not able to fathom how the 4th respondent could be found in contempt merely for instructing or authorising the 2nd respondent to depose to certain facts in encl. 182A when he had not sworn the impugned affidavit. Only the affidavit marked as encl. 28 was affirmed by the 4th respondent wherein he had merely adopted the contents of the 2nd respondent's affidavit in encl. 14. Mindful that encl. 182A was not affirmed by the 4th respondent, the alleged falsities, even if found to be so, are not affirmations on oath by him and this court could not commit the 4th respondent for contempt. Consequently, in this state of utter confusion this court is driven to err on the side of caution and, I now hold that because all the seven affidavits are so inextricably linked together I am bound to consider all the seven affidavits as contempt affidavits, and be guided by the ratio in case authorities pertaining to leave to cross-examine on such specie of affidavits. For this court to divide the seven affidavits and to compartmentalise them into separate species of affidavits for the purpose of application of different principles in its determination would be to take flight from the reality of the situation. In any event, it is appropriate here to observe that everything deposed to by the said respondents in their affidavits constituted an indelible record of their case which the applicant could still avail himself during normal cross-examination when the s. 181 petition is tried.

[9] I think the essence of the respondent's submission is that (though not so expressed), leave to allow cross-examination on the specie of affidavits that does not attract penal consequences require different considerations from leave to allow cross-examination on affidavits that attract penal consequences being the contempt affidavits. And, that the contents of the contempt affidavit (encl. 182A) are very closely connected to those of the six previous affidavits. If the affidavits are to be divided into contempt and non-contempt affidavits I agree with counsel for the applicant that in respect of the non-contempt affidavits – being encls. 14, 28, 31, 127, 147 and 156 – and based on a welter of authorities cited by him, leave to cross-examine the deponent on such affidavits would normally be allowed. The proviso, in my view, is that certain conditions that were authoritively laid down in *Indrani Rajaratnam & Ors v. Fairview Schools Bhd (Indrani)* [2002] 1 CLJ 1 (Ct of Appeal) must be met. And obviously, such exercise would not lead to a citation for contempt, which is criminal in nature and necessitate different considerations, as it entails penal consequences due to its quasi criminal aspect.

[10] Though it is not quite a pertinent consideration for the present purpose, yet the trite law to be noted is that a criminal and civil contempt of court is an offence of a criminal character or in nature of a criminal charge, and as such it must be proved beyond reasonable doubt (See *Re Bramblevale Ltd* (1970) and *Tay Seng Keng v. Tay EK Seng Co. Sdn Bhd* [1977] 1 LNS 133 (Fed Ct). (See also the decision of this court in *E & E Equipment Sdn Bhd v. Speci Avenue (M) Sdn Bhd & Ors* [2005] 1 LNS 355). To prove an offence of criminal contempt the petitioner would have to establish or clinch three essential ingredients namely: i) the statement deposed to is in fact false and misleading *(actus reus)*; ii) the statement was intended to be false and misleading *(mens rea)*; and, iii) the statement was made with the actual or inevitable intention or consequence of frustrating or obstructing the administration of justice or interferes with or impedes the administration of justice. See *Jaginder Singh & Ors v. The Attorney-General* [1983] 1 CLJ 69; [1983] CLJ (Rep) 176 at 179, *Yee Sang Metal* [2002] HKCU 1255 (High Court of Hong Kong), *R v. Christopher Charles Murfett* [2004] VSC 160 (Supreme Court of Victoria), and *Halsbury's Laws of England,* 4th edn, vol. 9(1) pp. 242-243.

[11] On the question whether leave to cross-examine could be allowed on 'contempt affidavits', due to the grave penal consequences which may result from the court's finding against the said respondents, I am *ad idem* with and I would adopt the views of Lord Denning MR in *Comet Products U.K. Ltd v. Hawkex Plastics Ltd And Another* [1971] 2 QB 67 ('Comet Products'). Though this authority is not binding on this court, the rationale therein was so cogently argued by Lord Denning that it is compelling on me to follow.

> At the end of the first day both parties anticipated that the cross-examination would proceed on the following day. But overnight Mr. Sherrard, who had been looking into the position, took objection to the cross-examination of Mr. Hawkins being allowed. *He argued that it was in the nature of a criminal proceeding and that he should not be compelled to submit himself to cross-examination on his affidavit.* In answer to this submission, Mr. Sparrow told the judge that he did not wish to cross-examine upon the subject of the main action. On being so told, the judge said that he would allow the cross-examination of Mr. Hawkins. Mr. Sherrard then said that he wished to appeal to this court. So the judge adjourned the case pending our decision. Mr. Sherrard has now come to us. I think we should give him leave to appeal.
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> This case raises questions of some importance. Mr. Sparrow submitted that in proceedings of this kind the defendant can be compelled to give evidence against himself. *Mr. Sparrow pointed out that this is a case of civil contempt and not criminal.* The difference is well known. A criminal contempt is one which takes place in the face of the court, or which prejudices a fair trial and so forth. A civil contempt is different. A typical case is disobedience to an order made by the court in a civil action.
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> I cannot accept Mr. Sparrow's submission. *Although this is a civil contempt, it partakes of the nature of a criminal charge.* The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding. I see that Cross J. in *Yianni v. Yianni* [1966] 1 WLR 120 so decided; and furthermore we ourselves in this court in *In re Bramblevale Ltd.* [1970] Ch. 128, 137, said that it must be proved with the same degree of satisfaction as in a criminal charge. *It follows that the accused is not bound to give evidence unless he choose to do so.* In this connection I quote what Bowen LJ said in *Redfern v. Redfern* [1891] P. 139, 147:

> It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, ... 'no one is bound to criminate himself'.
>
> This was not always the law in the case of civil contempt. In the days of Sir William Blackstone, 200 years ago, civil contempt was an exception to the general principle. In those days a plaintiff was entitled to deliver interrogatories to the defendant, which the defendant was bound to answer on oath. In his *Commentaries* 8th ed. (1778), Book 4, p. 287, Sir William said that "this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance"; and he went on to say, at p. 288, that "by long and immemorial usage [it] has now become the law of the land."
>
> I am prepared to accept that such a rule did exist in the days of Sir William Blackstone. But I do not think it exists any longer today. The genius of the common law has prevailed. *I hold that a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him prove his guilt. I reject the submission that the defendant is a compellable witness in the contempt proceedings against him.*

[12] Consequently, I hold that the 2nd and 4th respondents are not compellable witnesses in this contempt proceedings, unless they choose to do so, as happened in *Dr Leela Ratos & Ors v. Anthony Ratos* [1996] 4 CLJ 33. In any event, I am of the considered view that to allow the petitioner to cross-examine the respondents on encl. 182A or any of the previous affidavits would operate unfairly and would be prejudicial against the alleged contemnor as it would be difficult to restrict such cross-examination to only the circumstances of the Committal hearing so as to ensure that such exercise would not be for a collateral purpose. Unrestricted cross-examination would have little relevance to the petitioner's allegations of contempt and would be severely prejudicial to the said respondents since it would lead to an examination of the whole circumstances of the petition itself. In the *Comet Products (supra)*, the UK Court of Appeal disallowed cross-examination of the contemnor because the cross-examination could not be limited to the circumstances of the committal hearing, but would have led to an investigation of the whole circumstances of the original action. Therein Lord Denning MR had also observed in the following lucid language:

> It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case. *If the cross-examination could be limited to the particular circumstances of this alleged contempt, then it might be right to permit it.* But in the course of the discussion, and particularly that of this morning, it has become plain that the plaintiffs, through their advisers, desire a much wider cross-examination than that …
>
> It seems to me that such a claim to cross-examine does mean that he will be investigating the whole of the circumstances of the defendant, including the circumstances leading to the original action. However much he may disclaim it, it seems to me plain that Mr. Sparrow [counsel for the applicant], *if he were to cross-examine, would claim to investigate the defendant's state of mind from the beginning, and to cross-examine as to credit, as to character and so forth, all the way along the line …*
>
> The common law would not wish him to be cross-examined in the way that is suggested. Such a cross-examination would range over the whole of his state of mind on other occasions and in other circumstances, whereas the one issue is whether there has been a passing off of this red carton. *If this cross-examination were to be pursued, I can see question after question put, and objection after objection raised, extending over a long time. I do not think that would be appropriate in what in effect is a criminal charge. Therefore as a matter of discretion, as it is, the cross-examination ought not to be allowed.*

[13] Lord Cross (at p. 77 of the same judgment), also held that cross-examination should not be allowed where it is directed to a collateral purpose or where it might operate unfairly against the alleged contemnor:

> Presumably he intended to invite the court to infer that if Mr. Hawkins had a "guilty" mind initially, his state of mind had not changed after the injunction was granted. Evidence of Mr. Hawkins' original state of mind would have little or no bearing on the issue in the motion but admissions extracted in cross-examination might well assist the plaintiffs in the action. So the cross-examination would be largely directed to a **collateral purpose**. Moreover one must bear in mind that even civil contempt has a quasi criminal aspect. The projected cross-examination might well **operate unfairly** to Mr. Hawkins and I agree with my Lords that it should not be allowed.

[14] The petitioner's application for cross-examination does not sufficiently define or limit the scope of the cross-examination. From the written submission of counsel for the petitioner it also appears probable that the petitioner will take advantage of this proposed cross-examination to fish for evidence to support his principal non-contempt applications such as encls. 1 and 10. This makes it very likely that the proposed cross-examination will lead to an investigation of the whole of the circumstances of the re-amended petition, and if this happens the cross-examination will be for a collateral purpose.

[15] This court should exercise its discretion against allowing cross-examination given the following circumstances of the present case. The petitioner's allegations of perjury concern allegations of diversion of business opportunity, non-disclosure, and a share dilution scheme, which are matters to be investigated in the re-amended petition (encl. 149) and the Petitioner's Application for Receivers and Managers (encl. 10). Furthermore, the allegation of non-disclosure is the subject of the Petitioner's Discovery Applications (encls. 164 and 171).

[16] In any event, even if the ratio in *Comet Products (supra)* is not followed in respect of the contempt affidavits, this court should nevertheless exercise extreme caution in the conduct of these committal proceedings lest the respondents' rights to a fair hearing are impeded. And hence, the petitioner must show a greater necessity and stronger grounds for cross-examining the respondents in these committal proceedings than is normally required to cross-examine deponents in ordinary applications. This is simply because the consequences in these committal proceedings for the respondents are very serious. The allegation of perjury is an allegation of criminal contempt. The respondents are facing the possibility of imprisonment. Lord Denning commented on this issue in *Comet Products*. He said:

> Although this is a civil contempt, it partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding.

[17] It is inevitable that cross-examination of the respondents will lead to an exploration beyond the circumstances of the Committal Application to the whole circumstances of the Re-amended Petition and other interlocutory applications in this suit. I am of the view that a 'preliminary hearing' on all the facts and circumstances of this petition will greatly prejudice the respondents when the same is tried. It is unjust to allow the petitioner to have two bites of the cherry. The submission that the said respondents are compellable witnesses in the contempt proceedings against them has, in justice, to be rejected. This court has to be mindful that the Comet Products U.K. Ltd the applicant had sought, and was refused, leave to cross-examine the respondent on his affidavit to establish civil contempt for his willful disobedience of an injunction order of court, whereas in the case at hand the petitioner here has sought leave to cross-examine the said respondents on encl. 182A as well as the previous affidavits filed by them upon a charge of criminal contempt due to alleged falsities deposed in the affidavits. Such application which pertains to contents of an affidavit is a very novel application even in English or other Commonwealth jurisdictions. Thus, counsel for the petitioner did not cite any case authority from such jurisdictions which deals with an application for leave pertaining to contents of affidavits such as now before me.

[18] There are further compelling reasons why this court should disallow leave to cross-examine.

1) The cross-examination, if allowed, will result in the extended hearing of the Committal Application. The hearing will be further protracted as the respondents' counsel will take repeated objections to irrelevant or inappropriate cross-examination. Thus, most importantly, if leave is allowed it would lead to an inordinate delay of the trial of encl. 1.

2) Cross-examination is not essential as the facts and circumstances in these allegations of contempt add little weight to the issues that have to be decided at the committal hearing. As can be seen from the parties' affidavits, there are no major disputes as to facts and circumstances. The committal hearing by and large involves disputes on points of law.

3) Cross-examination of the respondents will also result in unnecessary cost, expense and delay. In particular, the 4th respondent is resident in Taipei, to Kuala Lumpur at least twice (assuming that there are no postponements) being once for the contempt proceedings and once for the trial of encl. 1.

4) The respondents when faced with the Petitioner's Application for Committal had to file the Contempt Affidavit (encl. 182A) in opposition. The petitioner alleged contempt on the basis that the six Previous Affidavits contain false and misleading statements. The respondents filed the Contempt Affidavit (encl. 182A) in reply, as omitting to do so would have amounted to an admission of the petitioner's allegations. Further, by cross-examining the respondents on the Contempt Affidavit, the petitioner will require this court to decide on issues raised in the six Previous Affidavits prior to the hearing of the respective applications in respect of which they were filed. This predetermination of the issues will be prejudicial to the respondents, and is akin to placing the cart before the horse.

[19] Consequently, I further hold that to allow cross-examination would operate unfairly and would be prejudicial to the said respondents.

[20] Even should I be wrong to treat the said previous affidavits as 'contempt affidavits', or be amiss on the law on the contempt affidavit (encl. 182A) and this court is clothed with a discretion - to be exercised upon the more liberal guidelines as in non-contempt affidavits – to compel the 2nd and 4th respondents to submit themselves for cross-examination, I would nevertheless hold that such discretion ought not to be exercised if the petitioner has not met the guidelines set out in *Indrani Rajaratnam & Ors v. Fairview Schools Bhd* [2002] 1 CLJ 1 *('Indrani')* in respect of non-contempt affidavits.

[21] The guidelines and the conditions to be met, which the court should address itself when considering whether to allow leave to cross-examine on non-contempt affidavits, has been lucidly and cogently set out, in *Indrani* by Siti Norma Yaakob JCA and KC Vohrah J. Her Ladyship Siti Norma Yaakob JCA had this to say:

That the appellants *never identified the issues* for which they maintain cross-examination had become necessary. This is not surprising as no formal application was made by them. Even so a perusal of the proceedings recorded by the trial judge fails to disclose what the issues are to warrant cross-examination. *Apart from stating orally that the respondent's many affidavits by various deponents raise many disputes as to facts, such disputes have not been identified by the appellants. If indeed there are factual disputes, the appellants have also failed to show whether they are relevant to the petition to warrant cross-examination.* On the contrary the learned trial judge found that the cross-examination would not advance the cause of justice as *there is sufficient affidavit evidence supported by contemporaneous documents* to enable the petition to be heard properly without the need of cross-examination.

KC Vohrah J also considered this point and held (at p. 10):

There was *confusion as to what the purpose* of the proposed cross-examination was for, there being *no attempt to show what was needed to be adduced under the proposed cross-examination of the affiants.* The learned counsel for the petitioners predicated his oral application on the vague ground that there were so many disputes as to facts that the court would not be able to know what was disputed merely by reading the affidavits.

It is important to take into account all factors when considering an application for cross-examination and *if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted.* As was reminded by Megaw LJ in *Comet Products v. Hawkex Plastics* [1971] 1 All ER 1145 at pp. 1146-1147…

It will be noted that in a local case, *Leisure & Allied Industries Pty Lyd v. Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FJ (as he then was) when dealing with an application by the defendant to cross-examine the plaintiff's witnesses on their affidavits took the same view and proceeded to *'see how the proposed cross-examination would be relevant to the issue'* in the plaintiff's application in order for him to exercise his discretion.

…

[22] On the question whether the applicant has met the guidelines laid out in *Indrani*, I make the following adverse observations that militates against the petitioner's case. His application for cross-examination does not identify the issues for which the petitioner alleges cross-examination is necessary. In his

application, the petitioner says that he "disputes and or challenges" the respondents' affidavits, and that there are "contradictions" between the affidavits, and the said respondents' explanations are "bare statements". However, the petitioner does not in his application or in his affidavit in support (encl. 185) elaborate any further, or refer to specific paragraphs in the said respondents' affidavits or to specific documents. The petitioner, in (encl. 185) gives other ambiguous and indefinite reasons for wanting to cross-examine the said respondents, but has not explained in reasonable detail or stated his basis for requiring cross-examination. For example, the petitioner claims that the said respondents' explanations are "not substantiated when tested against contemporaneous evidence" but fails to state the precise nature of the 'contemporaneous evidence'.

[23] Further, I am inclined to the view that the said respondents have, in their affidavits encl. 182A, 183 and 187 provided detailed and plausible explanations of the alleged contemptuous statements. In this regard, the petitioner has chosen not to address any of the explanations or evidence put forward by the said respondents. The petitioner's affidavit encl. 185 does not address the said respondents' explanations despite being prepared and affirmed after encls. 182A and 183. It is also to be noted that the petitioner has not filed any affidavit in reply to the 2nd respondent's affidavit affirmed on 14 July 2006 (encl. 187). Though it is clear that the petitioner is disputing certain facts, yet he has failed to show how these disputes are relevant to the Committal Application. Accordingly, the purpose of the proposed cross-examination remains questionable. In order to prove perjury, the petitioner must first of all prove that the alleged contemptuous statements are in fact false and misleading and he must discharge this burden of proof on the affidavit and documentary evidence that is already available and which has been referred to by him. The petitioner cannot simply level allegations against the said respondents and then attempt to elicit oral evidence by compelling the said respondents to disprove his allegations.

[24] The petitioner has, in his application for leave to cross-examine, given the following purported reasons for cross-examination: (a) to elicit an explanation on the alleged contradictory statements given; (b) to effectively determine the said respondents' true motives and reasons for the contradicting

statements made; and, (c) to test the said respondents' oral evidence against the evidence that is before the court. These purported reasons have, in my view, unwittingly revealed that the petitioner's true purpose is to fish for oral evidence from the said respondents to support his petition in encl. 1 and his other enclosures. This view is further supported by the fact that the petitioner's issues for cross-examination are vague and ambiguous. To support the suggestion that the privilege of self incrimination could not be invoked the petitioner referred to *Rice v. Gordon* [1843] 60 ER 225 which was a case decided in 1843, about 130 years before *Comet Products*. This case is not relevant as its facts are substantially different from the present case. *Rice v. Gordon* concerned an application by the plaintiff for the production of documents to support a charge of perjury committed in the main cause in which the defendant had admitted that he had custody of but contended that he should not be compelled to produce the documents because they tended to support the indictment. The court quite rightly held that if it should refuse the motion for production it would be holding out an inducement to the defendant to commit perjury in the early stage of the cause and prevent the court from administering justice in the suit. This is in contrast to the present application which is for cross-examination on affidavits with the view to securing a committal for contempt.

[25] The court should be slow to allow the cross-examination of the respondents on the grounds that the affidavits filed in interlocutory proceedings allegedly contain misleading information. This is because such a decision would set a dangerous precedent for our courts by opening the floodgates for similar strategies to be adopted by litigants even in cases such as urgent injunction applications. Surely, to condone or to approve of this strategy would severely impair the court's viability in the administration of justice. Hundreds of affidavits are filed in our courts everyday, most of which contain statements of facts which are in dispute. If litigants could file motions for contempt founded on contents of affidavits and then allowed to cross-examine the deponent on such affidavits, our courts would be bogged down with contempt proceedings rather than have the true and substantial relief sought litigated. Consequently, for all the compelling reasons above, the application of the petitioner in encl. 186 has to be and is dismissed with costs to the said respondents in any event.

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In Postlude

[26] Even after my decision on encl. 186, where I had refused leave, encl. 178 has still to be heard as it remains extant, though this court has to be mindful that the petitioner has every right to
B pursue encl. 178 to the very end. Thus, the 8 May 2007, has been fixed for hearing of the contempt application (encl. 178) as there is every indication that the same would be pursued. I think it is in the interest of all parties that the main purpose of the above petition should be dealt with without any further delay.
C Indeed, and I have also fixed a time line for the respective parties to put in their written submissions.

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